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No. 83-141

In the
Supreme Court of the United States

OCTOBER TERM, 1983

HAWAII HOUSING AUTHORITY, ET AL.,
Appellants,

v.

FRANK E. MIDKIFF, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief for Appellants

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Reply Brief for Appellants

Summary of Argument

Appellees' Brief demonstrates, more clearly than ever, that affirming the decision below would unleash federal courts to engage in unprecedented usurpation of both the legislative and the judicial functions of state governments that decide to employ their taking power to achieve broadly beneficial public ends.

Argument

I. The Ninth Circuit's Invalidation of Hawaii's Land Reform Act Impermissibly Usurped State Legislative Power.

Appellees labor long to establish a proposition appellants have never denied: namely, that the Constitution forbids even a compensated taking of property when executed "simply,"[1] "purely,"[2] "wholly,"[3] "exclusive[ly]"[4] and "for no reason other than"[5] to confer private benefit on private parties. Any such purely private taking would, of course, be struck down under the minimum rationality test mandated by all relevant twentieth-century precedent.[6] For such a purely private taking — one that created no public gain, benefit, or advantage — would serve no legitimate purpose of government, and would thus be void.

No such purely private taking, however, is involved in this case. The Hawaii Land Reform Act was designed by the state legislature not to benefit a particular class of identifiable individuals,[7] but rather — by bringing about compensated

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[1] Appellees' Brief at 47 n.129, 49, 51.

[2] *Id.* at 40, 45 n.125.

[3] *Id.* at 44, 45 n.126, 49.

[4] *Id.* at 40, 42.

[5] *Id.* at 40.

[6] *See* Brief for Appellants in Nos. 83-141 & 83-283 (hereinafter, "HHA Brief") at 24-32.

[7] As appellees repeatedly observe, landlots taken by the State pursuant to the Act may subsequently be leased or sold — by tenants who purchase from the State or indeed by the State itself — to parties other than the existing tenants. *See, e.g.*, Appellees' Brief at 71 & n.177, 72-73. Although appellees assert that this somehow makes the Act less "public" in purpose, it in fact only underscores that the Act favors *no* definable "private" group. *See also* Jurisdictional Statement in No. 83-141, at 22-23.

transfers of residential land long concentrated in the hands of a few landlords — to increase the alienability of real property, to broaden opportunities for residential land ownership, to mitigate the oligopolistic power of a small group of landowners, and to stabilize the Hawaiian economy.[8] Appellees nowhere deny that these are classic *public* purposes, of a sort pursued by legislatures and endorsed by courts throughout American history.[9] Rather, appellees claim that these purposes either are not genuinely embodied in the Act, or cannot effectively be achieved by the Act.[10] Not only are both claims groundless, but acceptance of the strict scrutiny on which they depend would plunge this Court into a swamp it decisively abandoned nearly half a century ago.

First, appellees flatly deny that the Act was intended "to diminish the 'concentration' of land ownership."[11] This assertion is little short of astonishing, for the Act rests centrally on just such an "antitrust predicate."[12] Indeed, few legislative findings could have been more expressly and repeatedly articulated in the text of the Act and its amendments than the findings that land ownership in Hawaii was excessively concentrated in the hands of a few[13]; that the market in residential property was seriously distorted by that small group's refusal to sell rather than lease, even in the face of rapidly rising demand[14]; and that legislation was necessary to correct

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[8] *See* HHA Brief at 1-6.

[9] *See id.* at 16-24.

[10] *See* Appellees' Brief at 66-75.

[11] *Id.* at 73; *see id.* at 12 n.42, 28 n.77, 73 n.183.

[12] *See id.* at 28 n.77.

[13] *See, e.g.*, Act 307 § 1(c) (A141-42); Act 184 § 1(a) (A144); Act 185 § 1 (A147-48); Act 186 § 2(a)(1)-(3) (A152-53). *See also* HHA Brief at 2 & n.4.

[14] *See, e.g.*, Act 307 § 1(e)-(g) (A142-43); Act 184 § 1(d) (A145); Act 186 § 2(a)(2)-(4) (A153). *See also* HHA Brief at 2-3.

this market failure, to create a more competitive residential property market, and thus to check inflation in land prices, rents and the cost of living generally.[15] The Act's antitrust purposes are thus plain on its face.[16] The Act's legislative history,[17] moreover, furnishes ample additional evidence of those purposes.[18] Finally, even if those purposes had not so plainly motivated the Hawaii legislature, this Court has long since abandoned the practice of voiding socioeconomic legislation simply because its legitimate aims had to be judicially surmised in the face of doubts about the legislature's actual purpose.[19]

Second, appellees advance an opinion that, in their view, the Act may not be effective in achieving its stated goals of dispersing residential land ownership, reducing inflation, and

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[15] *See, e.g.*, Act 307 § 1(h) & (j) (A143); Act 184 § 1(d) (A145); Act 185 § 1 (A147-51); Act 186 § 2(a)(2)-(7) & (9). *See also* HHA Brief at 4-5.

[16] Appellees' attempt to erase these purposes from the Act is futile. Appellees absurdly suggest that the Act can have no such purposes unless it explicitly invokes the term "monopoly" or "oligopoly." *See* Appellees' Brief at 12 n.42, 73 n.183. The legislature's repeated references to excessive concentration of land ownership and the need to disperse that concentration, however, can hardly be mistaken as anything other than references to "monopoly" or "oligopoly" and the need to break it up.

[17] *See* HHA Brief at 1 n.2, 3 nn.6 & 7, 4 n.10.

[18] The conference committee report accompanying the 1967 Act, for example, explicitly stated that the Act would check the landowners' "monopolistic advantage." *See id.* at 4 n.10. Appellees suggest that such clearly relevant contemporaneous legislative history must be wholly ignored unless its "loose language" is enacted verbatim by the legislature. *See* Appellees' Brief at 12 n.42. Appellees would thus reduce the judicial construction of statutes to a mechanical search for talismans incanted in their texts.

[19] *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 176-79 (1980); *id.* at 180-81 (Stevens, J., concurring in judgment); *New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976) (per curiam); *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). Federal judicial surmise about the legislature's actual purposes would, however, be premature in this case, for there has been neither any federal judicial evidentiary hearing about those purposes, *see* n.39 *infra*, nor any opportunity for dispositive state-court construction of those purposes, *see* § III.B *infra*.

stabilizing the Hawaiian economy.[20] This view is demonstrably erroneous.[21] But more important, it is utterly irrelevant to proper judicial review of the Act under a public-use challenge. For this Court has decisively held that federal courts must give "well-nigh conclusive" deference to any minimally rational legislative finding that a compensated governmental taking will serve a public purpose. *Berman* v. *Parker*, 348 U.S. 26, 32 (1954). Debates over the wisdom of takings — no less than debates over the wisdom of other kinds of socioeconomic measures[22] — have thus long been banished from federal courts and relegated solely to legislatures.[23] Appellees nonetheless beckon this Court into precisely such a debate.

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[20] *See* Appellees' Brief at 71-72, 73, 74-75.

[21] Appellees assert, for example, that "the legislature's finding that the transfers of title [under the Act] will combat inflation is baseless," because the Act will not directly increase the physical supply of land lots. *Id.* at 71. This argument, however, assumes a normally functioning, competitive market in land — a kind of market which, as the legislature expressly found, has long been absent in Hawaii because of the major landowners' oligopolistic concentration and the strong federal tax deterrents to sale of their land. *See* HHA Brief at 3 & nn. 6, 7. Because land prices have been artifically inflated in this distorted and noncompetitive market, it was entirely rational for the legislature to conclude that breaking up large landholdings — by inducing land sales at fair market value through a means that minimized sellers' tax liability — would help bring prices of residential lots in Hawaii down to competitive levels.

[22] *See id.* at 24-25 n.62, and cases cited therein.

[23] *Berman* v. *Parker's* announcement of the demise of *Lochner* in the takings area was hardly novel. Long before *Berman*, the First Circuit, for example, treated as settled the principle that a federal court must advance no view of its own about "the wisdom of the political [or economic] theory" underlying a taking that is challenged as not for public use. The court stated that "it is our duty to determine whether the [taking law] rested upon an arbitrary belief of the existence of the evils [it] was intended to remedy, and whether the means chosen are reasonably calculated to cure the evils reasonably believed by the Legislature to exist" — *not* "'to consider whether all the statements of fact which may be the basis of the [legislature's] belief are well-founded,'" *nor* "'to weigh conflicting evidence.'" *People of Puerto Rico* v. *Eastern Sugar Associates*, 156 F.2d 316, 324 (1st Cir.) (quoting *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 286-87 (1932) (Brandeis, J., dissenting)), *cert. denied*, 329 U.S. 722 (1946).

What appellees are thus urging, as they indeed all but concede,[24] is that *Berman* v. *Parker* be overruled,[25] and that the public-use requirement trigger far closer scrutiny of fully compensated takings than that mandated for regulatory or tax measures under the Equal Protection Clause or the Due Process Clause — even though such measures commonly alter property rights and transfer relative economic advantage *without* compensation.[26] Appellees would carve out an anachronistic Lochnerian oasis for federal judicial intervention in the socioeconomic affairs of our States whenever they choose to employ their eminent domain power rather than their other regulatory, tax, or spending powers. In all the eighty-nine pages of their brief, however, appellees advance not a single twentieth-century decision, and not one plausible reason, suggesting why this should be so.[27]

Nor can the radical nature of appellees' proposal be concealed by the elaborate seven-factor test which appellees proffer for "objective[ly]" distinguishing permissibly "public"

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[24] *See* Appellees' Brief at 78-82. *See also id.* at 63 ("it is the prerogative and duty of the courts independently to scrutinize the realities of a proposed condemnation and to invalidate those failing to pass constitutional muster").

[25] Appellees do make a limp attempt to distinguish *Berman* v. *Parker* based on a list of specific factual features present in that case but not this one. *See id.* at 77-78. But this list entirely misses the core meaning of *Berman*. For *Berman* held that, so long as a taking is rationally related to public ends, its particular mechanisms and contours rest entirely "in the discretion of the legislative branch," *not* that of the federal courts. 348 U.S. at 36. It is thus not for courts to say whether takings would better occur on an "area" rather than on a "piecemeal" basis, or would best be implemented by "an agency of private enterprise" rather than by "a department of government." *Id.* at 34-35.

[26] *See* HHA Brief at 24-29 & nn.63-69, and cases cited therein.

[27] As appellants have already demonstrated, logic and precedent alike cut entirely the other way. *See id.* at 30-32.

from impermissibly "private" takings.[28] Contrary to appellees' wishful suggestion, such a "test" cannot in fact prevent judges who might employ it from "subjective[ly] second-guessing"[29] determinations about the public good that this Court has long held are properly left entirely to legislatures, not courts. For the factors listed in appellees' novel test cannot meaningfully distinguish takings for a "public" use from those for a "private" use, as even the briefest reflection makes clear.

Some of appellees' factors — for example, the "public payment" factor[30] and the "change in use" factor[31] — offer no guidance at all to whether a taking serves a public purpose. A governmentally financed taking of a productive factory for conversion to a house for a mayor's personal crony, for instance, would surely *change use* at *public* expense, but those facts would in no way indicate that the taking generated any justifying public advantage. Other factors — for example, the "public transferee" factor[32] and the "continuing control" factor[33] — offer at best highly unreliable guidance to whether a taking serves a public purpose. A taking of land for transfer to a *public* agency for construction and operation of a highway, for instance, can be deliberately deployed to confer *private* benefit upon an influential legislator's friend by raising

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[28] *See* Appellees' Brief at 54-58, 61. While appellees point to various cases in whose particular circumstances these factors happened to be present or absent, they identify no authority and offer no analysis suggesting that these factors should be determinative of the public-use issue.

[29] *See id.* at 61.

[30] *See id.* at 54-55 (factor (b)).

[31] *See id.* at 55 (factor (c)), 56-57 (factor (e)). This factor echoes the majority opinion below. *See* 702 F.2d at 794-95 (A13-14).

[32] *See* Appellees' Brief at 55-56 (factor (d)); *see also id.* at 54 (factor (a)). This factor too echoes the majority opinion. *See* 702 F.2d at 795 (A14-15).

[33] *See id.* at 57 (factor (f)); *see also id.* at 57-58 (factor (g)).

the value of land he owns adjacent to the chosen highway site; likewise, a taking of land for transfer to a *private* developer can be intentionally harnessed to *public* advantage by facilitating a redevelopment project that creates jobs and increases tax base.[34] Literal application of appellees' test in such circumstances would thus lead perversely to the invalidation of broadly beneficial takings but the survival of narrowly favoritistic ones. But deciding when to discount or disregard the test's criteria to avoid such anomalous results would simply enmesh courts in the very *legislative* inquiries about what constitutes the public good that appellees claimed it was the test's virtue to avoid.

Nor would a test turning on which sort of benefit from a taking — "public" or "private" — is "primary," and which is "incidental,"[35] avoid these problems. Such a test would require courts to discern all the various constituencies whose welfare a taking might improve, and then to rank their relative gains. But just as it is unimaginable that courts should decide who benefits more, for example, from a regulation limiting debt-adjusting to lawyers — the lawyers or the public; from a regulation limiting eyeglass refills to eye doctors — opthalmologists or the public; or from a regulation confining milk to non-plastic containers — the paperboard industry or the public,[36] so it is unimaginable that courts should decide who benefits more, for example, from a taking for a downtown development project — the developer's shareholders and partners, who enjoy greater profits, or the public, which enjoys increased employment and tax base; or from the Hawaii

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[34] *See generally* Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 G.W.L.Rev. 355, 369-376 (1983) (private-transferee takings are no more likely to be improperly motivated or beyond public accountability than public-transferee takings).

[35] *See* Appellees' Brief at 50 n.134, 76 & n.192.

[36] *See generally* HHA Brief at 25-27 & nn.63-69, and cases cited therein.

Legislature's choice to employ compensated condemnations to end land oligopoly in Hawaii — the landowners, who receive fair market value plus a distinct federal tax benefit,[37] the current occupants, the ultimate purchasers, or the public, which gains increased access to full home ownership at fair prices.

In short, once it is recognized, as it must be, that *takings* for the public good, like *regulations* for the public good, often necessarily involve some identifiable quantum of private benefit,[38] then it is *only* the test that appellants urge — the minimum rationality test long mandated by this Court for *all* socioeconomic legislation — that can avoid such brazen judicial usurpation of the legislative function as that by the court below.[39] Nor can such usurpation be justified by appellees' unwarranted supposition that, without it, the power of eminent domain would freely swallow up rights of private property.[40] For the taking power, which is closely constrained by the judicially enforceable requirement of just compensation, is far less potent a means of redistributing wealth than

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[37] *See id.* at 3 nn.6-7.

[38] This is paradigmatically so in an antitrust context, where divestiture to *private* actors is the only way to achieve the *public* good of increased competition.

[39] The decision below thus should be reversed. But if the Court were to agree with appellees instead — and thus to hold that federal courts should revert to the long-abandoned role of actively re-evaluating legislative determinations that socioeconomic legislation will serve the public good — then not affirmance but remand would be appropriate. For the district court below upheld the Act's constitutionality on summary judgment without any factual hearing. If the federal courts are to be permitted to weigh conflicting evidence regarding the rationality of legislative determinations such as Hawaii's, then there must be an opportunity for both sides to present such evidence fully — an opportunity not yet had in this federal action.

[40] *See, e.g.*, Appellees' Brief at 42-49; *see also id.* at 58 (takings reviewable only for their rationality and the fairness of their compensation will have "no practical limit").

are uncompensated exercises of legislative taxing, spending, and regulatory power. Moreover, like all legislative power, the power of eminent domain is held in check by independent constitutional rights, such as those to fair hearing and to equal protection of the laws.[41]

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[41] Further doctrines for the protection of property against even fully compensated takings might surely be fashioned from the Constitution's requirements of due process — for example, in instances where property is too closely linked to one's "personhood," *see* Radin, *Property and Personhood*, 34 Stan. L. Rev. 957, 1005-06 (1982), or to the efficacy of one's political participation, *see* Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1112-13 (1981), for its taking to be made whole by just monetary compensation. But appellees fail utterly to explain why any such doctrine should be fashioned in this case. In sharp contrast to the hypothetical examples appellees conjure up, *see* Appellees' Brief at 58-60, the Hawaii Land Reform Act uproots no individuals or groups from their homes or communities. Moreover, the Act provides undisputedly fair monetary compensation for land held, in appellees' case, strictly for its investment value. Therefore, contrary to the suggestion of the Brief of Amicus Curiae the Office of Hawaiian Affairs, at 29, the Act does not in any way undermine the interests of appellees' Hawaiian beneficiaries in the continued support of charitable programs now funded by income from the land. For appellees have never suggested that equal income could not be earned on reinvestment of the compensation awards. Finally, even if certain Hawaiian lands were sacred to appellees' Hawaiian beneficiaries — as the Brief of Amici Curiae Queen Liliuokalani Trust *et al.* suggests at 8-9 — such a novel claim of special value could never justify facial invalidation of the entire Act. Such a claim, if acceptable at all, could at most underpin challenges to the propriety of, or the fairness of compensation for, particular takings under the Act as applied. Indeed, it would be more than ironic if the unique characteristics of Hawaii's heritage were to trigger special federal judicial interference in state legislative decisions about how best to accommodate the needs of Hawaii's people, rather than heighten federal judicial deference to those decisions as all relevant authorities command. *See, e.g., Cincinnati* v. *Vester*, 281 U.S. 439, 446 (1930); *Clark* v. *Nash*, 198 U.S. 361, 367 (1905); *Fallbrook Irrigation District* v. *Bradley*, 164 U.S. 112, 162-63 (1896).

II. The Land Reform Act Violates Neither Due Process Nor the Contract Clause.

A. *Due Process.*

Analogizing to *Eubank* v. *City of Richmond*, 226 U.S. 137 (1912), and *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928), appellees suggest that allowing lessees to initiate takings under the Act constitutes an unconstitutional delegation of power.[42] The Hawaii Land Reform Act, however, is fundamentally unlike the ordinances this Court invalidated in *Eubank* and *Roberge*.

For as this Court stressed in both *Eubank* and *Roberge*, the statutes struck down in those cases vested private individuals with final, unreviewable discretion to block certain exercises of their neighbors' property rights. *See Roberge*, 278 U.S. at 122; *Eubank*, 226 U.S. at 143. In contrast, the Act, far from authorizing lessees directly to appropriate the land on which they reside, merely enables them to trigger public hearings before a state agency — namely, the HHA. Before title can be transferred to the State, the HHA must determine that acquisition by the State would serve the Act's public purposes, a determination fully challengeable in subsequent judicial condemnation proceedings. The argument that such private triggering of statutory procedures unconstitutionally delegates power was emphatically rejected in *New Motor Vehicle Board* v. *Fox*, 439 U.S. 96, 108-09 (1978), where this Court noted that "[a]lmost any system of private or quasi-private law could be subject to the same objection." *Id.*[43]

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[42] *See* Appellees' Brief at 83-85.

[43] Moreover, unlike the statutes at issue in *Eubank* and *Roberge*, the Act authorizes private individuals to trigger proceedings serving broad public purposes, as discussed in § I *supra*. The ordinances invalidated in *Eubank* and *Roberge* had no such general purposes; indeed, this Court in *Roberge* distinguished the statute struck down there from that upheld in *Thomas Cusack Co.* v. *City of Chicago*, 242 U.S. 526 (1917), on precisely this

B. *Contract Impairment.*

Contrary to appellees' assertions,[44] the Land Reform Act is manifestly compatible with the Contract Clause. The decisive difference between this Act and the statutes invalidated in *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1974), and *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), is that this Act provides full compensation to those whose contractual rights it impairs. As this Court has consistently recognized, "[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *Id.* at 19 n.16.[45]

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basis. *See Roberge*, 278 U.S. at 122; *Eubank*, 226 U.S. at 143-45. Hawaii's decision to permit lessees simply to pursue or forego the conditional opportunity the Act affords them to purchase the land they rent in no way offends due process.

[44] *See* Appellees' Brief at 85-89.

[45] The interruption of leases caused by the Hawaii Land Reform Act would not violate the Contract Clause even if it were uncompensated. For unlike the statute struck down in *United States Trust Co.*, the Act relieves contractual obligations only of private parties, not of the State, and therefore, even without compensation, would need to meet only the relaxed requirement that it be rationally related to a legitimate public purpose. *See Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697, 705-706 (1983); *United States Trust Co.*, 431 U.S. at 22-23. Moreover, in contrast to the "extremely narrow" statutory purpose found constitutionally illegitimate in *Allied Structural Steel*, the Land Reform Act, like the statute upheld in *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), was "enacted to protect a broad societal interest rather than a narrow class." *Allied Structural Steel*, 438 U.S. at 247-49; *see also Energy Reserves Group*, 103 S. Ct. at 705 n.13. Finally, this case is "sharply distinguishable" from *United States Trust Co.* and *Allied Structural Steel* on grounds similar to those this Court found dispositive in *Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296 (1983): the contractual interruption caused by the Land Reform Act is not the Act's "sole effect" but rather is "incidental" to its primary goal of facilitating the passing of title. *Id.* at 2306-07.

III. The Ninth Circuit's Invalidation of the Land Reform Act Impermissibly Usurped State Judicial Power.

A. *Waiver of Abstention.*

Appellees' contention that the HHA appellants ("HHA") waived both *Pullman* and *Younger* abstention[46] is wholly without merit. *First*, appellees' astonishing assertion that HHA "failed to assert" and indeed "affirmatively argued" against *Pullman* abstention in this action[47] is flagrantly erroneous. To support this assertion, appellees inexplicably cite a supplemental brief filed in the court below not by HHA but by a group of intervenors.[48] In sharp contrast to those intervenors, however, HHA urged *Pullman* abstention in no uncertain terms in its supplemental brief in the court below,[49] as it had in the district court.[50] Moreover, even if HHA had not so plainly preserved its *Pullman* argument, this Court's power to order *Pullman* abstention to avoid premature, unnecessary, or indiscriminate facial invalidation by federal courts of state legislation is not subject to veto by a party even if waiver is explicit and intentional.[51]

Second, appellees are similarly mistaken in asserting that HHA waived *Younger* abstention. Contrary to appellees' characterization,[52] HHA's answer was not limited to *Pullman*

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[46] *See* Appellees' Brief at 25, 30-32.

[47] *See id.* at 25.

[48] *See id.* (citing JA122-25).

[49] *See* JA135-36.

[50] *See* JA64 (HHA answer), 82-86 (HHA response to motion for preliminary injunction).

[51] *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374, 379 n.5 (1978); *Procunier* v. *Martinez*, 416 U.S. 396, 400-01 (1974); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). Indeed, in *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 476-77 (1977), this Court considered whether to order *Pullman* abstention even though the sole proponent was a private amicus.

[52] *See* Appellees' Brief at 15-16 & n.58.

abstention.[53] Nor did HHA argue against *Younger* abstention in the court below, as appellees erroneously assert.[54] In any event, this Court has made clear that it will rule on an argument for *Younger* abstention on its merits even when it has not been raised below.[55]

In light of the fact that HHA thus plainly asserted its abstention claims in both the district court and the court below — which reached them on their *merits* — appellees' assertion that HHA purposely withheld its abstention claims in order to "toy with," "gambol" with, or "'sandbag[ ]'" the courts[56] is frivolous.

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[53] HHA's abstention defense rested rather on the general ground that a state-court construction might avoid the necessity for deciding constitutional issues. *See* JA64. This ground supports *Younger* as well as *Pullman* abstention. *See Moore* v. *Sims*, 442 U.S. 415, 428 (1979).

[54] *See* Appellees' Brief at 30-31. In fact, HHA expressly invoked *Younger* and *urged* abstention on the ground that, as in *Trainor* v. *Hernandez*, 431 U.S. 434 (1977), "important state policies" were implicated by the Land Reform Act. *See* JA135. HHA should not be penalized for its candor in suggesting that application of *Younger* to this action would require extension of *Younger's* progeny. *See id.* Nor should HHA be penalized for a mistake of fact that led it to assert that no state condemnation proceedings had begun before proceedings of substance on the merits in the federal court so as to trigger abstention — namely, its statement that the first relevant condemnation action was filed on January 30, 1980. *See* JA134. For in fact, as appellees themselves point out, the first condemnation suit against appellees' property was filed on September 21, 1979, *see* Appellees' Brief at 35, which was before, not after, the district court had heard — no less decided — the first motion for partial summary judgment against appellees. Finally, HHA should not be penalized for not arguing below that designation proceedings, not in-court condemnation proceedings, triggered abstention. *See* HHA Brief at 44. For its supplemental brief was filed over seven months before this Court's decision in *Middlesex Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), illuminated this ground for *Younger* abstention.

[55] *See, e.g., Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259, 264 n.8 (1977); *Zablocki* v. *Redhail*, 434 U.S. at 379 n.5. Only when a state has refused to assert *Younger* before *this* Court has the Court decided to ignore that ground for abstention. *See, e.g., Ohio Bureau* v. *Hodory*, 431 U.S. at 479-80. That was precisely the situation in all the cases cited in Appellees' Brief at 30 n.83, but clearly is not the case here.

[56] *See* Appellees' Brief at 32-33.

B. *Pullman Abstention.*

Appellees have but one retort to HHA's argument for *Pullman* abstention to permit state-court construction of the Land Reform Act — namely, that this federal action involves no unsettled question of state law.[57] But, as appellees' brief itself makes abundantly clear, a dispute over what purposes the Act was designed to serve lies at the very heart of this case: appellees allege that the Act was not in fact designed to achieve the public purposes stated on its face, but rather that its true objective is simply to satisfy private desires.[58] If it is not clear beyond doubt that the true objective of the Act is in fact to serve the antitrust purposes it plainly articulates,[59] then surely it is for the *state* courts to say, at least in the first instance, what purposes the state legislature *was* trying to achieve through the Act.[60] For there can be no doubt that what the objectives of a statute are, no less than how the statute is intended to operate, is a question of state law.[61] And any federal decision to invalidate the Act for serving no public

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[57] *See id.* at 26.

[58] *See, e.g., id.* at 3, 7, 12, 52-53, 68, 75. This view, of course, was shared by the court below, which brushed off the Act's stated public purposes as "mere rationalizations." *See* 702 F.2d at 798 (A21).

[59] *See* HHA Brief at 16-23; *see also* § I *supra*.

[60] Appellees suggest that any such state-court construction would require "adding provisions [to the Act] that the state legislature omitted." Appellees' Brief at 27. This would be true, of course, only if one agreed with appellees and the court below that all the public purposes plainly embodied in the Act had at the outset to be stripped away. In any event, appellees offer no reason why Hawaii cannot empower its courts to play an active role in its law-making process. *See* HHA Brief at 39 n.83.

[61] The aims and history of the Act are no less "susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question," *Kusper* v. *Pontikes*, 414 U.S. 51, 54 (1973), than were the intent of the criminal sanctions and the purpose of the restrictions on consumer publicity and secondary product boycotts in the Arizona Farm Labor Statute that prompted the Court to order abstention in *Babbitt* v. *Farm Workers*, 442 U.S. 289, 307-12 (1979).

purpose before the state courts have had an opportunity to elaborate its purposes not only threatens indiscriminate intrusion in state programs, but also may be purely advisory.[62]

In short, the sweeping breadth of appellees' facial challenge,[63] which rests on a most tenuous reading of the Act that insultingly impugns the Hawaii Legislature's integrity,[64] and which would dismantle at a blow an entire statutory framework for achieving the broad-ranging goals evinced by the Act's terms and history,[65] combine to make abstention

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[62] If the state courts, for example, conclude that the Act's purposes are to create a more competitive market in residential property and so combat inflation — purposes appellees virtually concede would be permissibly public if genuinely intended by the Act, *see* Appellees' Brief at 71-75 — appellees' facial challenge to the Act might be withdrawn, or at least substantially modified. Thus state-court resolution of the Act's purposes could indeed "avoid the possibility of unnecessarily deciding a constitutional question." *Harris County Comm'rs* v. *Moore*, 420 U.S. 77, 83 (1975). And should appellees challenge that state judicial determination as rendered in bad faith, nothing would preclude them from seeking its reversal in this Court.

[63] As this Court has noted, the dangers of unnecessary and precipitous disruption of important state programs — through federal constitutional rulings predicated on merely advisory readings of state statutes — "increases with the breadth of the challenge." *Moore* v. *Sims*, 442 U.S. at 428. Thus it is not remarkable but entirely appropriate that, absent some compelling countervailing interests such as the First Amendment freedoms at stake in *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964), broad facial challenges give way to abstention.

[64] Appellees' and the circuit court's dismissal of the elaborate legislative findings in this case as mere "rationalizations" masking private purposes amounts to an unsupported and demeaning assault on the good faith of the Hawaii Legislature, and calls for a novel and unacceptable federal inquiry into state legislative motive. *Cf. United States* v. *O'Brien*, 391 U.S. 367 (1968) (inquiry by coordinate branch).

[65] Thus the "equitable considerations" invoked by appellees in fact cut entirely in appellants' favor. *See* Appellees' Brief at 28 n.78. Here, unlike in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. at 329, there is a distinct danger of "disruption of an entire legislative scheme of regulation." On the other hand, there is in this case no danger of irremediable damage to First Amendment rights such as those involved in the cases appellees cite, *see* Appellees' Brief at 28 n.78, or to any comparable right, given the State's pledge not to transfer title pending resolution of the issues in this case.

especially appropriate in this case. Moreover, not only is this a case involving matters "peculiarly within the province of the state courts," but there is also already an "action pending in state court that will likely resolve the state-law questions underlying the federal claim." *See Harris County Commissioners* v. *Moore*, 420 U.S. 77, 87 (1975).[66] Finally, abstention would be appropriate here even if there were no dispute over the purposes of the Act raising unsettled questions of state law, for here, "the nub of the whole controversy may be the state constitution." *See id.* at 85; *see also Reetz* v. *Bozanich*, 397 U.S. 82 (1970). Contrary to appellees' assertion, the "public use" requirement of section 20 of the Hawaii Constitution is not a mere restatement of its federal counterpart, and might well be construed more stringently by the State's highest court.[67]

Accordingly, because the confrontation appellees would force between the state legislature and the federal judiciary is neither clearly defined nor unavoidable, abstention is justified to avoid the rush to judgment that appellees irresponsibly demand.

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[66] In *Hawaii Housing Authority* v. *Midkiff*, Civ. No. 63408 (Haw. 1st Cir. Sept. 6, 1983) (Grieg, J.), a full evidentiary hearing on the public-use issue has been completed. *See* HHA Brief at 11 & n.43. Appeal of Judge Grieg's decision upholding the Act to the Hawaii Supreme Court could speedily resolve the state-law questions and so avoid or alter the federal constitutional issues. Thus any delay entailed by abstention in this case would be slight. And appellees nowhere contest the adequacy of the state courts or suggest any prejudice against them there.

[67] *See Hawaii Housing Authority* v. *Castle*, 653 P.2d 781 (1982), in which the Hawaii Supreme Court not only discussed the federal and state public-use requirements separately, but remanded for an evidentiary hearing regarding the bases for the legislature's findings in the Act — a hearing involving far more probing scrutiny in state court than all relevant authority would have called for under the federal Constitution, *see* § I *supra*. Nor, in light of the already pending state adjudication, *see* note 66 *supra*, is the possibility that the Hawaii Supreme Court might invalidate or narrow the Act on state constitutional grounds "hypothetical," as appellees assert, *see* Appellees' Brief at 28.

C. *Younger Abstention.*

Appellees do not contest the applicability of *Younger* abstention to the civil context of the Land Reform Act, but simply deny that any state judicial proceeding was commenced against them early enough to trigger such abstention. They are in error.

First, appellees argue that some state proceedings, though indisputably judicial, were begun too late — namely, that condemnation actions filed by HHA in state court on September 21, 1979, began after actions of substance on the merits in the district court.[68] But, as appellees acknowledge, the only district court actions prior to that date were the issuance of a temporary restraining order and denial of a sweeping preliminary injunction against the Act urged by appellees on the public-use grounds at issue in this appeal.[69] Contrary to appellees' assertion, these actions were not more substantial on the merits of appellees' public-use challenge than were the preliminary proceedings held insufficient to bar abstention in *Hicks* v. *Miranda*, 422 U.S. 332, 349 (1975).[70]

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[68] *See id.* at 35, 37-38. While appellees also suggest that the condemnation suits filed on September 21, 1979, should count for nothing because they were "subsequently dismissed," *see id.* at 21 n.68, that fact cannot legitimate the district court's retention of jurisdiction during their pendency. In any event, the action involving Wai-Kahala Tract "C," Civ. No. 59202, was in fact pending in state court until January 21, 1981, well after the district court's entry of final judgment. *See* HHA Brief at 42-43.

[69] The district court's grant of a preliminary injunction concerning two provisions of the Act that related solely to compensation — *not* public use or the propriety of condemnation — is irrelevant. The filing in the district court of a partial summary judgment motion on September 18, 1979, is likewise of no consequence, for the court did not conduct a hearing on that motion until November 14, 1979, nor rule against appellees on that motion until December 19, 1979 — both well after the filing of the state condemnation actions. *See* JA16-18.

[70] *See* HHA Brief at 43 n.87. Appellees' attempt to distinguish *Hicks*, *see* Appellees' Brief at 37-38 n.102, twists the rule of that case beyond recognition. Had the Court agreed with appellees' characterization that the federal suit in *Hicks* was effectively "filed second, not first," *id.*, it would never have had to pose, much less decide, the question whether *Younger* applied "where

Second, appellees argue that other state proceedings — conducted by the HHA under the Act — were begun early enough[71] but were insufficiently judicial.[72] Appellees' reliance on section 516-51(b) of the Act for this proposition is misplaced. That section provides merely that private arbitration or negotiation of the amount of *compensation* not be considered part of a condemnation proceeding under the Act. It therefore has no bearing whatever on whether *public-use* determinations or designations by the HHA — wholly separate actions of a public agency — constitute a portion of condemnation proceedings under the Act, or even if they do not, whether they are judicial within the meaning of *Younger*. Nor is appellees' conclusory assertion that HHA proceedings lack judicial attributes in the least persuasive[73]; indeed, appellees'

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state . . . proceedings are begun . . . *after* the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court." 422 U.S. at 349 (emphasis added). Moreover, appellees' reliance on *Town of Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977), and *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), is misplaced, for neither case suggests that denial of a preliminary injunction constitutes an action of substance on the merits for purposes of the *Hicks* rule. Indeed, *Doran* would be analogous only if the district court had *granted* appellees' sweeping preliminary injunction motion so as directly to preclude the subsequent initiation of state condemnation proceedings which in fact took place here.

[71] As appellees concede, the HHA had determined after public hearing that the condemnation of lots in Wai-Kahala Tract "H" would serve a public use on October 20, 1978, well before the filing of the federal complaint. *See* Appellees' Brief at 20 n.67. Appellees nowhere deny that on that date, a condemnation action against them was in every real sense initiated. *See* HHA Brief at 44. Likewise before the filing of the federal action, on February 22, 1979, the HHA had conducted a public hearing to determine whether the condemnation of lots in Kamiloiki Valley would serve a public use. *See* Appellees' Brief at 21 n.67. In appellees' own characterization, such determinations by the HHA would inexorably lead to condemnation. *See* Motion to Affirm in No. 83-236 at 2.

[72] *See* Appellees' Brief at 35-36.

[73] Contrary to appellees' contention, *see id.* at 36 & n.97, HHA proceedings, which involve elaborate evidentiary inquiry and fully open and

denial that the HHA provided a forum before which they could advance their constitutional objections to the Act is simply belied by their submissions treating it as exactly that.[74] In any event, were there any uncertainty whether HHA had the operational capacity to adjudicate constitutional claims, that would be a matter of state law, and would only heighten the need for *Pullman* abstention in this case.

Conclusion

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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adversarial hearings, are far closer to the disciplinary proceedings involved in *Middlesex County Ethics Comm.* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982), than to the summary ex parte actions that the Court found insufficient to trigger *Younger* in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (action by a building inspector), and *Fuentes* v. *Shevin*, 407 U.S. 61 (1972) (action by a court clerk).

[74] Appellees seek to trivialize their own submission to the HHA in the Kamiloiki proceeding as "merely designed to give HHA notice of Trustees' intention to have their constitutional claims adjudicated before a competent court." Appellees' Brief at 21 n.67. Quite on the contrary, however, their letter in no uncertain terms stated their Fifth and Fourteenth Amendment objections to the designation or condemnation of their tracts and concluded: "In light of the objections herein raised, the Trustees urge the Hawaii Housing Authority to decline to designate any portion of [the relevant tracts] for acquisition."